IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34306

STATE OF IDAHO,	)	**2008 Unpublished Opinion No. 704**
	)	
Plaintiff-Respondent,	)	**Filed: November 10, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
BRIAN JAMES WHITAKER,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Deborah A. Bail, District Judge.

Judgment of conviction and sentence for possession of a controlled substance with the intent to deliver, affirmed.

Molly J. Huskey, State Appellate Public Defender; Sarah E. Tompkins, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Thomas Tharp, Deputy Attorney General, Boise, for respondent.

LANSING, Judge

Brian James Whitaker appeals from his judgment of conviction for possession of a controlled substance with the intent to deliver. Whitaker asserts that the district court erred in not ordering a psychological evaluation before imposing a sentence and that the district court abused its discretion when it sentenced Whitaker to a term of eight years with three years fixed. We affirm.

I.
BACKGROUND

Whitaker was arrested on October 6, 2006, in a motel room where he and two others were found in possession of methamphetamine, marijuana, drug distribution paraphernalia, and at least one gun. Whitaker was subsequently charged with possession of methamphetamine with the intent to deliver, Idaho Code section 37-2732(a).

According to Whitaker's subsequent statement to the presentence investigator, while on bond for the possession with intent charge he briefly checked into a psychiatric and chemical dependency facility, where he was treated and given medication for depression and schizophrenia. Whitaker mentioned at his change of plea hearing that his schizophrenia included "voices and stuff going on," but did not elaborate further. Whitaker pleaded guilty pursuant to a plea agreement, in which the State dismissed two additional charges and recommended a unified sentence of eight years with three years fixed.

Both the State and Whitaker's counsel mentioned at sentencing that they believed Whitaker would benefit from a mental health evaluation. Though the district court did not order an evaluation before imposing sentence, the court did recommend in its judgment that Whitaker participate in the Therapeutic Community Program while incarcerated. The court imposed a unified sentence of eight years with three years fixed.

II.

ANALYSIS

Whitaker contends that the district court erred when it sentenced him without first ordering a psychological evaluation. A court must order a mental examination of the defendant "[i]f there is reason to believe the mental condition of the defendant will be a significant factor at sentencing and for good cause shown . . . ." I.C. § 19-2522(1). The determination whether to obtain a mental health evaluation of a defendant ordinarily lies within the sentencing court's discretion. *Id*.; Idaho Criminal Rule 32(d); *State v. Wolfe*, 124 Idaho 724, 726-27, 864 P.2d 170, 172-73 (Ct. App. 1993). Where a defendant does not request a mental evaluation or object to the presentence investigation (PSI) on the ground that an evaluation has not been performed, we will disturb the district court's decision only for manifest disregard of the I.C.R. 32 standards. *State v. Collins*, 144 Idaho 408, 409, 162 P.3d 787, 788 (Ct. App. 2007); *State v. Toohill*, 103 Idaho 565, 566-67, 650 P.2d 707, 708-09 (Ct. App. 1982). Manifest disregard requires more than an assertion that compliance with the rule was simply inadequate. *Id*.

Whitaker asserts that both he and the State requested a psychological evaluation for Whitaker at the sentencing hearing. At the end of its argument at sentencing, the State said:

> Therefore, the State's going to ask this court to impose a sentence of three years fixed, five years indeterminate. Hopefully, that will give the defendant long enough to remain in a structured environment, take advantage of programming, possibly be considered for the Therapeutic Community when the time arises and,

> hopefully, he won't top out, and he can finally get it together. The State also believes that this defendant could benefit from an appropriate mental health evaluation.

Directly after the prosecutor concluded her remarks to the court, Whitaker's counsel said at the beginning of his own remarks, "Also, regarding the mental health evaluation, I believe that that would be extremely helpful, to know some things that are going on with Mr. Whitaker." Whitaker's counsel then went on to address Whitaker's character and other relevant topics. While Whitaker asserts that these statements by the State and by his trial counsel both constituted motions asking the court to order a mental evaluation for Whitaker before sentencing him, we are not convinced. As for the prosecutor's comment, it would be self-defeating for the State to recommend a specific sentence but then immediately move for a presentence mental evaluation to determine what the sentence should be. Instead, the more logical interpretation of the prosecutor's evaluation comment, especially coming immediately after the State's comment about prison programs, is that the prosecutor believed Whitaker would benefit from any mental health evaluations that might be made available to him while serving the recommended prison sentence.

As for Whitaker's trial counsel, his statement apparently referencing the prosecutor's earlier mental health evaluation statement is similarly unclear. Whitaker's counsel simply said he believed an evaluation would be helpful, but did not say who should perform the evaluation, when it should be performed, or whether it should have any bearing on Whitaker's sentencing. He plainly did not request that sentencing be deferred until such an evaluation could be obtained. We thus are unable to conclude that either party moved for a mental examination to inform the court's sentencing decision. Since Whitaker did not object to the PSI, we review the district court's decision to not order a mental health evaluation for manifest disregard of I.C.R. 32. *Collins*, 144 Idaho at 409, 162 P.3d at 788; *Toohill*, 103 Idaho at 566-67, 650 P.2d at 708-09.

Having reviewed the record presented to us in this case, we conclude that Whitaker has failed to establish a manifest disregard for I.C.R. 32. There are statements in the record that Whitaker had been prescribed medication for depression and schizophrenia and had checked himself into a psychiatric facility while on bond for the instant offense. However, these were all self-reports by Whitaker; there is no such information from any other source. The PSI indicates that his claimed mental health issues were drug-induced, apparently meaning they would be resolved once Whitaker was in prison and off drugs. Moreover, the PSI also showed that

information gathered in past investigations of Whitaker had revealed no significant non-drug-related mental health issues. As recently as half a year before his sentencing in this case, during an interview by "BPA, Inc.," he had denied having any mental health diagnosis. While there was information before the district court that could have justified the court in ordering a mental health evaluation had it chosen to do so, the information before the district court was not such that a failure to order an evaluation constituted a manifest disregard of the Rule 32 standards.

Whitaker also asserts that the district court abused its discretion in imposing a unified sentence of eight years with three years fixed. When a sentence is challenged on appeal, we examine the record, focusing upon the nature of the offense and the character of the offender, to determine if there has been an abuse of the sentencing court's discretion. *State v. Young*, 119 Idaho 510, 511, 808 P.2d 429, 430 (Ct. App. 1991). The defendant bears the burden to show that the sentence is unreasonably harsh in light of the primary objective of protecting society and the related goals of deterrence, rehabilitation and retribution. *Toohill*, 103 Idaho at 568, 650 P.2d at 710. Considering the record here, including Whitaker's substantial criminal history, we conclude that Whitaker's sentence was not an abuse of discretion.

The judgment of conviction and sentence are therefore affirmed.

Chief Judge GUTIERREZ and Judge PERRY **CONCUR.**